Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

ORDER ON RECONSIDERATION

Adopted: January 20, 2015 **Released: January 21, 2015**

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this *Order on Reconsideration*, we respond to several Petitions for Reconsideration.[1] We clarify the applicability of the *Second Report and Order*[2] in states that have state-level franchising, grant the petitions with respect to the request that we reconsider our Final Regulatory Flexibility Analysis, and deny the petitions in all other respects.

2. In the *First Report and Order and Further Notice of Proposed Rulemaking*,[3] the Commission adopted rules and provided guidance to ensure that local franchising authorities ("LFAs") do not unreasonably refuse to award competitive franchises for the provision of cable services, which is prohibited under Section 621(a)(1) of the Communications Act of 1934, as amended (the "Act").[4] The *First Report and Order* found that some franchising practices violated Section 621(a)(1) and also contravened the dual congressional goals of enhancing cable competition and accelerating broadband deployment.[5] Specifically, the Commission found that: (1) an LFA's failure to issue a decision on a competitive application within the timeframes specified in the order constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (2) an LFA's refusal to grant a competitive franchise because of an applicant's unwillingness to agree to unreasonable build-out mandates constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (3) an LFA's refusal to grant a competitive franchise because of an applicant's

[1] We received three petitions for reconsideration of the Second Report and Order in this proceeding: one from the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.*, one from the City of Breckenridge Hills, Missouri, and one from the City of Albuquerque, New Mexico *et al*.

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 (2007) ("*Second Report and Order"*).

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*First Report and Order and Further Notice of Proposed Rulemaking*"), *pet for review denied*, *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[4] 47 U.S.C. § 541(a)(1).

[5] *First Report and Order* at 22 FCC Rcd at 5103.

unwillingness to agree to a variety of franchise fee requirements that are impermissible under Section 622 of the Act constitutes an unreasonable refusal to award a competitive franchise within the meaning of Section 621(a)(1); (4) it would be an unreasonable refusal to award a competitive franchise if an LFA denied an application based on a new entrant's refusal to undertake certain obligations relating to public, educational, and government channels ("PEG") and institutional networks ("I-Nets") under Sections 622 and 611; and (5) it is unreasonable under Section 621(a)(1) for an LFA to refuse to grant a franchise based on issues related to non-cable services or facilities because an LFA's jurisdiction applies only to the provision of cable services over cable systems pursuant to Section 602.[6]

3. Some of the Commission's findings in the *First Report and Order* relied, in part, on statutory provisions that do not distinguish between incumbent providers and new entrants;[7] however, because the initial *NPRM* in the proceeding focused on competitive entrants, the findings were made applicable only to new entrants.[8] The Commission therefore issued a *Further Notice of Proposed Rulemaking* ("*FNPRM*") to provide interested parties with the opportunity to provide comment on which of those findings should be made applicable to incumbent providers and how that should be done.[9]

4. In the *Second Report and Order*, the Commission determined that the prior findings involving franchise fees under Section 622, PEG and I-Net obligations under Sections 622 and 611, and non-cable related services and facilities under Section 602 relied on statutory provisions that did not distinguish between incumbents and new entrants, and therefore should be applicable to incumbent operators.[10] The Commission also determined that most favored nation ("MFN") clauses, by design, would provide some franchisees the option and ability to adjust their existing obligations if and when a competing provider obtains more favorable franchise provisions.[11]

5. Following the release of the *Second Report and Order*, petitioners sought reconsideration of our rulings regarding most favored nation clauses, in-kind payments, mixed-use networks, and the applicability of the *Second Report and Order* to state level franchising. They also brought to our attention an inconsistency between the rules adopted and the rules analyzed in the accompanying Final Regulatory Flexibility Analysis ("FRFA").[12] In response to these petitions, the Commission received a number of filings opposing reconsideration of these issues[13] and subsequent replies.[14] We discuss each of these issues in turn below.

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[6] *Id*.

[7] *Id*. at 5165. Other portions of the *First Report and Order* were based entirely on Section 621(a)(1).

[8] *Id.*

[9] *Id.*

[10] *Second Report and Order,* 22 FCC Rcd at 19633-34.

[11] *Id.* at 19643.

[12] *See* NATOA *et al.* Petition for Reconsideration and Clarification (filed Dec. 21, 2007); City of Breckenridge Hills, Missouri Petition for Reconsideration (filed Dec. 21, 2007); City of Albuquerque, New Mexico *et al.* Petition for Reconsideration (filed Dec. 21, 2007).

[13] *See* Verizon Opposition to Petitions for Reconsideration (filed Feb. 11, 2008); NCTA Opposition to Petitions for Reconsideration (filed Feb. 11, 2008); Comments of the State of Hawaii (filed Feb. 11, 2008).

[14] *See* NATOA *et al.* Reply to Oppositions to Petitions for Reconsideration and Clarification (filed Feb. 21, 2008); City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration (filed Feb. 26, 2008); City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration (filed Feb. 26, 2008).

II. DISCUSSION

A. State Level Franchising

6. We first address Petitioners' request for clarification regarding whether the *Second Report and Order* applies to state level franchises.[15] In the *First Report and Order,* the Commission determined that it did not have a sufficient record to determine what constitutes an "unreasonable refusal to award an additional competitive franchise" with respect to franchising decisions where a state is involved versus a local franchising authority.[16] It therefore expressly limited the findings and regulations in the *First Report and Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority.[17] In the *FNPRM,* the Commission tentatively concluded that the findings in the *First Report and Order* "should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs," reasoning that several of the "statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants."[18] The *FNPRM* sought comment on this tentative conclusion.[19] In denying various franchising authorities' petitions for review of the Commission's *First Report and Order,* the United States Court of Appeals for the Sixth Circuit observed that "[d]espite its preemption of local laws and regulations," the Commission, in the *First Report and Order,* "declined to preempt state law, state-level franchising decisions, or local franchising decisions 'specifically authorized by state law … because it lacked 'a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.'"[20] In the *Second Report and Order,* the Commission "provide[d] further guidance on the operation of the local franchising process," explaining that to "promote the federal goals of enhanced cable competition and accelerated broadband development, we extend a number of the rules promulgated in … [the *First Report and Order*] to incumbents as well as new entrants."[21] The Commission, however, did not explicitly discuss whether its findings in the *Second Report and Order* applied to state franchising decisions. In response to a request for clarification, the State of Hawaii argued that because we did not address this issue in the *Second Report and Order*, we did not intend to apply its findings to state-level franchising.[22] Both NCTA and Verizon argued that the Commission unambiguously applied the *Second Report and Order*'s findings to state level franchising, because it stated that the statutory interpretations at issue in the proceeding are "valid throughout the nation."[23]

7. The different interpretations discussed above indicate a need for the Commission to clarify the *Second Report and Order*'s applicability. Specifically, it is necessary to clarify whether the findings regarding franchise fees under Section 622,[24] PEG and I-Net obligations under Sections 622 and 611,[25] and non-cable related services and facilities under Section 602[26] apply to state level franchising.

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[15] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 3-5; NATOA Petition on Reconsideration and Clarification at 10.

[16] *First Report and Order,* 22 FCC Rcd at 5102 n.2.

[17] *Id.*

[18] *Id.* at 5165.

[19] *Id.*

[20] *Alliance for Community Media v. FCC,* 529 F.3d 763, 772 (6th Cir. 2008).

[21] *Second Report and Order,* 22 FCC Rcd at 19633 ¶ 1.

[22] *See* Comments of the State of Hawaii at 3-5.

[23] *See* NCTA Opposition to Petitions for Reconsideration at 6; Verizon Opposition to Petitions for Reconsideration at 2.

[24] *Second Report and Order*, 22 FCC Rcd at 19637-38.

[25] *Second Report and Order*, 22 FCC Rcd at 19638-40.

We clarify that those rulings were intended to apply only to the local franchising process, and not to franchising laws or decisions at the state level. This clarification is consistent with the stated scope of both the *FNPRM* and the *Second Report and Order.* Specifically, the *FNPRM* sought comment on which of the findings made in the *First Report and Order* should extend to incumbent cable operators.[27] In deciding which findings would extend to incumbent cable operators, the Commission made clear in the *Second Report and Order* that it was providing "further guidance on the operation of the *local franchising process"* and that it was extending a number of rules promulgated in the *First Report and Order* to incumbents.[28] As explained above, in the *First Report and Order,* the Commission stated that its rulings were limited to competitive franchises "at the local level."[29] In both the *FNPRM* and the *Second Report and Order,* the Commission expressed its intent to extend the *First Report and Order*'s rulings to incumbent cable operators, but said nothing about extending those rulings to state-level franchising laws. Some commenters argue that language included in the *Second Report and Order*[30] indicates that the Commission intended its findings to be binding on both the local and state level franchising process.[31] We disagree that these statements suggest that those rulings extend beyond local franchising authorities. For the same reason we limited the rulings in the *First Report and Order* to the local franchising level – the lack of sufficient information in the record about the state-level franchising process – we did not extend those rulings in the *Second Report and Order* to state-level franchising laws or decisions.[32] If any interested parties believe that the Commission should revisit this issue in the future, they remain free to present the Commission with evidence that the findings in the *First Report and Order* and/or the *Second Report and Order* are of practical relevance to the franchising process at the state-level and therefore should be applied or extended accordingly.[33]

B. Most Favored Nation Clauses and Disruption of Existing Contracts

8. We decline to modify the conclusions concerning most favored nation ("MFN") clauses and disruption of existing contracts. In the *Second Report and Order*, the Commission concluded that the determinations in the *First Report and Order* may allow competitive providers to enter markets with franchise provisions more favorable than those of the incumbent provider, and expected that MFN clauses, "pursuant to the operation of their own design, will provide some franchisees the option and

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[26] *Second Report and Order*, 22 FCC Rcd at 19640-41.

[27] *First Report and Order,* 22 FCC Rcd at 5165.

[28] *Second Report and Order,* 22 FCC Rcd at 19633 (emphasis added).

[29] *First Report and Order,* 22 FCC Rcd at 5102 n. 2.

[30] *See, e.g., Second Report and Order*, 22 FCC Rcd at 19642 ("The statutory interpretations set forth above represent the Commission's view as to the meaning of various statutory provisions, such as Section 622, and these interpretations are valid immediately"); *id.* at 19642 n. 60 ("because these interpretations do not depend on Section 621(a)(1), they are also valid throughout the nation").

[31] *See, e.g.,* Verizon Opposition, dated February 11, 2008, at 2-4.

[32] *See* Comments of the State of Hawaii at 4-6 (arguing that the Commission cannot apply the *Second Report and Order* to state level franchising because there was not a sufficient record to do so).

[33] Nothing in this *Order on Reconsideration*, of course, changes the fact that in litigation involving a cable operator and a franchising authority, a court anywhere in the nation would be required to apply the FCC's interpretation of any provision of the Communications Act that would be pertinent (e.g., Section 622), including those interpretations set forth in the *First Report and Order* and *Second Report and Order*. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (a court must apply the "uniform nationwide interpretation of the federal statute by the centralized expert agency created by Congress"); *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000).

ability to change provisions of their existing agreements."[34] The Commission also concluded that these clauses would allow incumbents to change provisions of their existing franchises to conform to the findings of the *First Report and Order* without otherwise modifying the franchise.

9. Petitioners argue that these conclusions are inconsistent with our preemption of level playing field regulations in the *First Report and Order*.[35] Petitioners assert that MFN clauses have the same effect as level playing field regulations, and therefore they should also be preempted. NCTA counters that the decisions on MFN clauses should not be reconsidered because of their pro-competitive and public policy purposes.[36] NATOA disagrees with that assertion, especially since both the Department of Justice and the Federal Trade Commission have labeled MFN clauses as "anti-competitive" in certain instances.[37]

10. We adhere to our previous determinations on these issues for the reasons stated in the *Second Report and Order*. Most favored nation clauses allow franchisees to adjust their franchise obligations if a franchisor grants a competitive provider more favorable franchise provisions than those in existing contracts. With respect to disruption of existing contracts, the *Second Report and Order* did not give incumbent providers a unilateral right to breach their obligations. The *Second Report and Order* directed the incumbent and LFA to work cooperatively to address any issues that may arise.[38] As petitioners have not raised any new arguments, instead relying on perceived inconsistencies with the *First Report and Order*'s findings regarding level playing field regulations,[39] we reaffirm the prior conclusion that MFN clauses are contractual terms that are not affected by any of the Commission's findings in the *First Report and Order*.[40]

C. In-Kind Payments

11. We adhere to our previous conclusions in the *Second Report and Order* regarding in-kind payments. In the *First Report and Order*, the Commission interpreted Section 622, which limits the amount of franchise fees that an LFA may collect from a cable operator to five percent of the cable operator's gross revenues, subject to certain exceptions in subsection (g).[41] We concluded that "in-kind" payments – non-cash payments, such as goods and services – count toward the five percent franchise fee cap.[42] In the *Second Report and Order*, the Commission concluded that its interpretation of Section 622 "applies to both incumbent operators and new entrants."[43] LFAs petitioned for reconsideration of the inclusion of in-kind payments in calculating the franchise fee cap, arguing that the Commission's

[34] *Second Report and Order,* 22 FCC Rcd at 19642-43.

[35] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 14-15; NATOA *et al.* Petition for Reconsideration and Clarification at 4-6.

[36] *See* NCTA Opposition to Petitions for Reconsideration at 7-8.

[37] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 5.

[38] *Second Report and Order,* 22 FCC Rcd at 19643.

[39] We disagree that MFN clauses have the same effect as level playing field regulations. The *First Report and Order* noted the Commission's concern that level playing field regulations "unreasonably impede competitive entry". *First Report and Order*, 22 FCC Rcd at 5163. Unlike level playing field regulations, MFN provisions have no effect on market entry; they merely allow an incumbent to obtain the same franchise terms that already applied to their new competitors. Thus, MFN clauses don't create the sort of market entry concerns that led the FCC to preempt level playing field regulations in the *First Report and Order.*

[40] We also find that the FTC and DOJ decisions discussed by the Petitioners are not analogous to this situation, and therefore are not applicable here.

[41] *First Report and Order*, 22 FCC Rcd at 5144-50; 47 U.S.C. § 542.

[42] *First Report and Order*, 22 FCC Rcd at 5147-50.

[43] *Second Report and Order,* 22 FCC Rcd at 19637-8.

determinations give an overly expansive scope to Section 622(g)(2)(D), which exempts "charges incidental to the awarding or enforcing of the franchise" from the five percent franchise fee cap and also expand the definition of in-kind payments in the *First Report and Order*.[44] Verizon contends that the Commission's decision in the *Second Report and Order* is consistent with its statutory interpretation in the *First Report and Order*, and that unless all in-kind fees related to the provision of cable services are properly included in the franchise fee cap, the cap would be meaningless.[45] Petitioners respond that the *First Report and Order* includes only in-kind requirements unrelated to cable service in the franchise fee cap, not in-kind requirements that are related to cable service.[46]

12. As an initial matter, we disagree with the Petitioners that the Commission's interpretation of the phrase "incidental to" in Section 622(g)(2)(D) goes beyond or is inconsistent with our interpretation in the *First Report and Order*. The Commission concluded in the *First Report and Order* that the term "incidental" in Section 622(g)(2)(D) should be limited to the list of incidental charges provided in the statute, as well as other minor expenses.[47] The Commission examined the existing case law under Section 622(g)(2)(D) and determined that certain fees - including attorney and consultant fees, application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments - are not necessarily to be regarded as "incidental" and thus exempt from the five percent franchise fee cap.[48] The Sixth Circuit Court of Appeals upheld this interpretation, noting that "three district courts independently arrived at the same interpretation … as the Commission."[49] In the *Second Report and Order* the Commission explicitly stated that the *First Report and Order's* conclusions regarding application of the term "incidental" in Section 622(g)(2)(D) extend to incumbents, and again stated that only those incidental expenses that are listed in the statutory provision,[50] as well as other minor expenses, may be excluded from the five percent franchise fee cap.[51] The Commission's interpretation of Section 622(g)(2)(D) in the *Second Report and Order* mirrors, and does not expand, the interpretation in the *First Report and Order.* Consistent with the Sixth Circuit's holding, this interpretation of Section 622(g)(2)(D) is reasonable, and we continue to adhere to it.

13. Further, we disagree with petitioners that the *First Report and Order* limited the exemption of in-kind payments only when such in-kind payments are unrelated to cable service. While the *First Report and Order* does specifically state that "any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap,"[52] the *First Report and Order* also stated that not all free or discounted services provided to an LFA and in-kind payments were incidental costs exempt from franchise fees, and that "[a]ccordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's

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[44] City of Albuquerque, New Mexico Petition for Reconsideration *et al.* at 5-8; 47 U.S.C. § 542(g)(2)(D).

[45] *See* Verizon Opposition to Petitions for Reconsideration at 8-10.

[46] *See* City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration at 2-3.

[47] *First Report and Order*, 22 FCC Rcd at 5145-49. Section 622(g)(2)(D) exempts from franchise fees "requirements or charges incidental to the awarding or enforcing of the franchise, *including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages*." (emphasis added).

[48] *First Report and Order*, 22 FCC Rcd at 5147-49. *See also* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 5-8.

[49] *Alliance for Community Media v. FCC*, 529 F.3d 763, 783 (6th Cir. 2008)

[50] *See* 47 U.S.C. § 542(g)(2)(D).

[51] *Second Report and Order*, 22 FCC Rcd at 19638.

[52] *First Report and Order,* 22 FCC Rcd at 5149.

franchise fee payments."[53] In a section entitled "Charges incidental to the awarding or enforcing of a franchise," the *First Report and Order* identified "free or discounted services provided to an LFA" as one type of "non-incidental" cost that counted toward the franchise fee cap.[54] In that context, the Commission was referring to free or discounted cable services. The Commission discussed in-kind payments for non-cable services in a separate section of the *First Report and Order* entitled "In-kind payments unrelated to provision of cable service."[55] The Sixth Circuit also referenced these different types of in-kind payments separately when it upheld the FCC's interpretation of the five percent cap on fees.[56] Thus, in upholding the FCC's interpretation, the Court recognized that the agency was applying the cap to in-kind payments involving both cable and non-cable services. Consistent with the *First Report and Order,* the *Second Report and Order* also notes that non-incidental in-kind fees must count toward the 5 percent franchise fee cap, and does not limit the franchise fee exemption to in-kind payments that are unrelated to cable service.[57]

D. Mixed-Use Networks

14. We decline to modify the conclusions in the *Second Report and Order* regarding mixed-use networks. In the *First Report and Order*, the Commission concluded that LFAs' jurisdiction applies only to the provision of cable services over cable systems.[58] In the *Second Report and Order*, the Commission clarified that this conclusion extends to incumbent cable operators as well.[59] Petitioners argue that the *Second Report and Order*'s findings that LFA jurisdiction is limited to cable service is incorrect, as the Act "recognizes local authority with respect to 'cable systems' or 'cable operators' without restriction to 'cable service.'"[60] Verizon disagrees, stating that a provider is a cable operator only to the extent it provides "cable service" and that any statutory provisions applicable to "cable operators" or "cable systems" do not provide an LFA with authority over non-cable services.[61] LFAs assert in reply that legislative history indicates that they have authority over cable systems in their provision of non-cable services.[62]

15. For the reasons stated in the *Second Report and Order*, we adhere to our previous determination on this issue. The *Second Report and Order* extended the Commission's findings on mixed-use networks to incumbent providers.[63] The Commission provided further clarification that LFAs' jurisdiction is limited to the provision of cable services over cable systems and that LFAs cannot use their

[53] *First Report and Order*, 22 FCC Rcd at 5149.

[54] *Id.*

[55] *First Report and Order*, 22 FCC Rcd at 5149-50.

[56] *See Alliance for Community Media*, 529 F.3d at 782 (discussing "free or discounted services" separately from "any requests made by LFAs that are unrelated to the provision of cable services").

[57] *Compare First Report and Order*, 22 FCC Rcd at 5149 *with Second Report and Order*, 22 FCC Rcd at 19637-38, fn 32.

[58] *First Report and Order*, 22 FCC Rcd at 5155-56.

[59] *Second Report and Order*, 22 FCC Rcd at 19640.

[60] *See* City of Albuquerque, New Mexico *et al.* Petition for Reconsideration at 8, *citing* 47 U.S.C. § 552 (a LFA may establish and enforce "customer service requirements of the cable operator"); 47 U.S.C. § 551 (a cable operator is subject to privacy requirements when it provides "any cable service or other service to a subscriber").

[61] *See* Verizon Opposition to Petitions for Reconsideration at 6, noting that "a provider is only a 'cable operator' to the extent that it is providing 'cable service' over a 'cable system.' 47 U.S.C. § 522(5).

[62] *See* City of Albuquerque, New Mexico *et al.* Reply to Oppositions to Petition for Reconsideration at 6-7, *citing* H.R. No. 98-834, as reprinted in 1984 U.S.C.C.A.N. 4655, 4681.

[63] *Second Report and Order*, 22 FCC Rcd at 19640-41; *First Report and Order,* 22 FCC Rcd at 5155.

franchising authority to regulate non-cable services provided by an incumbent.[64] The Commission's *First Report and Order* and the *Second Report and Order* make clear that LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant. As petitioners have not raised any new arguments, we reaffirm the prior conclusion.[65]

E. Regulatory Flexibility Act

16. We grant Petitioners' request that we depart from our Regulatory Flexibility Analysis and submit a revised FRFA in order to comply with the mandates of the Regulatory Flexibility Act. The Regulatory Flexibility Act requires that an agency prepare a FRFA[66] in conjunction with the promulgation of a final rule in order to assess its impact on small entities and to minimize any undue burdens. Petitioners note that the FRFA attached in the Appendix to the *Second Report and Order* provided an analysis of the tentative conclusions set forth in the Initial Regulatory Flexibility Analysis ("IRFA") rather than the rules adopted.[67] Because of this inconsistency, they urge us to reconsider the FRFA to reflect the rules adopted which, they assert, will reveal significant burdens faced by small jurisdictions that would require a reconsideration of the entire *Second Report and Order*.[68] NATOA further asks that both the initial and final analyses be reissued to examine the economic impact on small jurisdictions and small organizations in more detail.[69] Petitioners argue that making the statutory interpretations of the *Second Report and Order* effective immediately instead of on renewal will unduly disrupt and preempt existing contracts and will impose analysis, negotiation, and/or litigation costs upon LFAs, and that these costs were not taken into account in the RFA analysis.[70]

17. NCTA contends that the petitioners' arguments are without merit. NCTA asserts that, because the *Second Report and Order* merely extends existing requirements to incumbent providers, local franchising authorities ("LFAs") should already be familiar with existing franchising requirements, and implementation with respect to incumbents will not be unduly disruptive.[71] Therefore, NCTA argues, LFAs will be prepared to deal with the issues that arise as a result of the *Second Report and Order* regardless of whether these interpretations are applied at the time of renewal or immediately.[72] They also state that any burdens that arise will come from an LFA's choice to contest the *Second Report and Order*'s conclusion that the Commission's statutory interpretations supersede existing franchises, and that no negotiation and/or litigation costs will be imposed on LFAs if they choose not to contest the Commission's statutory interpretations.[73] In response, petitioners assert that, even if they do not challenge the Commission's statutory interpretations, LFAs must review on a case-by-case basis any

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[64] *Second Report and Order* at 19640-41.

[65] Petitioners do claim that "localities have authority over cable systems, even if those systems are used to provide other services." *See, e.g.,* 1984 House Report at 4678-79, 4681. While this portion of the legislative history discusses what constitutes a cable service, it does not indicate what authority localities have over such services. Nor does it address whether localities may regulate non-cable services provided over cable systems.

[66] *See* 5 U.S.C. § 604.

[67] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 2-3; NATOA Petition for Reconsideration and Clarification at 9.

[68] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 6-9.

[69] *See* NATOA Petition on Reconsideration and Clarification at 6-10.

[70] *See* City of Breckenridge Hills, Missouri Petition for Reconsideration at 6-8, NATOA Petition on Reconsideration and Clarification at 6-10.

[71] *See* NCTA Opposition to Petitions for Reconsideration at 4.

[72] *Id*.

[73] *See Id.* at 4-5.

incumbent's claims that the *Second Report and Order* preempts or modifies its franchise.[74] Petitioners argue that, as responsible contracting parties, LFAs cannot abandon their contractual rights without careful study.[75] Petitioners also assert that to do otherwise would run afoul of the LFA's fiduciary duties to the public.[76]

18. We agree with the petitioners that, rather than completing an analysis of the rules adopted, the analysis was inadvertently based on the tentative conclusions presented in the Initial Regulatory Flexibility Analysis, set forth in Appendix C of the *First Report and Order and Further Notice of Proposed Rulemaking*.[77] In order to comply with the mandates of the Regulatory Flexibility Act, we hereby submit a Supplemental Final Regulatory Flexibility Analysis, set forth in the Appendix, to reflect the rules adopted in the *Second Report and Order*. Regarding the claim that the Commission failed to analyze the economic impact on small entities, the IRFA, FRFA and Supplemental FRFA all analyze the impacts on small entities, and determine that, because the *Second Report and Order* unifies existing regulations across all market participants and any potential franchise preemption or modification is limited in scope, the impact is *de minimis* and is likely to be over by now, given the passage of time since the *Second Report and Order.* As for consideration of alternatives, we agree with NCTA's contention that, since the findings in the *Second Report and Order* were matters of statutory interpretation, the result was statutorily mandated regardless of the RFA analysis. In addition, the IRFA and FRFA discuss the economic impact on small entities, including small government jurisdictions. NATOA argues that the Commission should also consider PEG channel operations.[78] NATOA's filing does not indicate the extent to which these entities fall outside the small government and small cable operator categories. The Commission does not routinely break out small entities to such a detailed level, and we also note that during the IRFA comment phase no commenter suggested that additional entities should be considered in the analysis. Finally, we disagree with NATOA that it is necessary to begin the Regulatory Flexibility Analysis over again. The outcome of the Supplemental FRFA does not show a substantially greater burden than the initial FRFA. Because the error does not change the outcome of this proceeding, but would merely cause further delay of the proceeding, there is no harm to petitioners. Therefore, we believe that the revised FRFA is sufficient to redress the error.

III. PROCEDURAL MATTERS

19. *Paperwork Reduction Act Analysis*. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. In addition, we note that there is no new or modified "information burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

20. *Final Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act, [79] the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis ("Supplemental FRFA") relating to this *Order on Reconsideration*. The Supplemental FRFA is set forth in an Appendix.

[74] *See* City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration at 2; NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 4.

[75] *See* City of Breckenridge Hills, Missouri Reply to NCTA's Opposition to Petition for Reconsideration at 2.

[76] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 4.

[77] *First Report and Order*, 22 FCC Rcd at 5181-85.

[78] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 8.

[79] *See id.*

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that pursuant to the Sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, this *Order on Reconsideration* IS ADOPTED.

22. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the City of Albuquerque, New Mexico et al, the City of Breckenridge Hills, Missouri and National Association of Telecommunications Officers and Advisors, et al. ARE HEREBY GRANTED IN PART AND DENIED IN PART as described above. This action is taken pursuant to the authority contained in Sections 1, 2, 4(i), 303, 405, 602, 611, 621, 622, 625, 626, and 632 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 405, 522, 531, 541, 542, 545, 546, and 552, and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429.

23. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

24. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Order on Reconsideration* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Supplemental Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rulemaking* ("*FNPRM*") to this proceeding.[2] The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. The Commission received one comment on the IRFA. Subsequently, the Commission adopted a Final Regulatory Flexibility Analysis ("FRFA") in the *Second Report and Order* in this proceeding.[3] Following the release of the *Second Report and Order*, petitioners sought reconsideration of the FRFA based on an inconsistency between the rules adopted and the rules analyzed in the accompanying FRFA. As explained in this *Order on Reconsideration*, we submit this Supplemental Final Regulatory Flexibility Analysis to reflect the rules adopted in the *Second Report and Order* and to conform to the RFA.[4]

A. Need for, and Objectives of, the Second Report and Order

2. The *Second Report and Order* ("*Order*") extends a number of the rules and findings promulgated in this docket's First Report and Order dealing with Section 611 and Section 622 of the Communications Act of 1934, as amended (the "Communications Act").[5] The *First Report and Order* adopted rules in accordance with Section 621(a) of the Communications Act to prevent Local Franchising Authorities ("LFAs") from creating unreasonable barriers to competitive entry of cable operators into local markets.[6] It also provided clarifications of Section 611, restricting LFAs' authority to establish capacity and support requirements for PEG channels,[7] and Section 622, setting limits on the franchise fees LFAs may charge cable operators.[8] Neither of these sections distinguishes between the treatment of new entrants and incumbent cable operators.[9] The Commission extends these findings to incumbent cable operators to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. The Commission also finds that it cannot preempt state or local customer service rules exceeding Commission standards.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, the Local Government Lawyer's Roundtable, submitted a comment that specifically responded to the IRFA. The Local Government Lawyer's Roundtable contends that the Commission should issue a revised IRFA because of the erroneous determination that the proposed rules would have a *de minimis* effect on small governments. They argue that the Commission has not given

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, 5164 (2006) ("*First Report and Order*").

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 ("*Second Report and Order*").

[4] *See* 5 U.S.C. § 604.

[5] 47 U.S.C. §§ 531, 622.

[6] *First Report and Order*, 22 FCC Rcd at 5103.

[7] 47 U.S.C. § 531.

[8] 47 U.S.C. § 622.

[9] 47 U.S.C. §§ 531(a), 622(a)

weight to the economic impact the rules will have on small governments, including training and hiring concerns.

4. We disagree with the Local Government Lawyer's Roundtable's assertion that our rules will have any more than a *de minimis* effect on small governments. LFAs today must review and decide upon competitive and renewal cable franchise applications, and will continue to perform that role. While the Local Government Lawyer's Roundtable expresses concern about additional training that may be necessary to understand these actions, and potential hiring of additional personnel to accommodate the *Order's* requirements, we disagree that those steps will be necessary. The *Order* simply extends existing, limited requirements to apply to incumbent cable providers. LFAs should be familiar with those existing requirements, and therefore should not need additional training or personnel to implement the *Order's* requirements. Moreover, modifications made to the franchising process that result from this proceeding further streamline the franchising process, ultimately lessening the economic burdens placed upon LFAs.

5. After issuing the FRFA in the *Second Report and Order,* the Commission received a Petition for Reconsideration and Clarification from the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.* regarding the Regulatory Flexibility Analysis. The petition repeated the Local Government Lawyer's Roundtable arguments discussed above, and also argued that the Commission failed to consider actual alternatives, failed to include small organizations in the IRFA, and that the FRFA provided an analysis of the tentative conclusions set forth in the Initial Regulatory Flexibility Analysis ("IRFA") rather than the rules adopted. First, as discussed in the attached Order on Reconsideration, the Commission disagrees that it failed to consider alternatives. The Commission determined that since the findings in the *Second Report and Order* were matters of statutory interpretation, the result was statutorily mandated regardless of the RFA analysis, and that, therefore, no meaningful alternatives existed. Regarding NATOA's argument that the Commission failed to include small organizations in the IRFA, we find that the IRFA and FRFA discuss the economic impact on small entities, including small government jurisdictions. While NATOA argues that the Commission should also consider PEG channel operations,[10] NATOA's filing does not indicate the extent that these entities do not fall within the small government and small cable operator categories. The Commission does not routinely break out small entities to such a detailed level, and during the IRFA comment phase, no commenter suggested that further entities should be additionally considered in the analysis. Finally, we agree with NATOA that, rather than completing an analysis of the rules adopted, the analysis was inadvertently based on the tentative conclusions presented in the Initial Regulatory Flexibility Analysis, set forth in Appendix C of the *First Report and Order and Further Notice of Proposed Rulemaking*, instead of the rules adopted in the *Second Report and Order*.[11] In order to comply with the mandates of the Regulatory Flexibility Act, we are submitting this Supplemental Final Regulatory Flexibility Analysis to correctly reflect the rules adopted in the *Second Report and Order.*

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."[13] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[14] A small business

[10] *See* NATOA Reply to Oppositions to Petition for Reconsideration and Clarification at 8.

[11] *See First Report and Order*, 22 FCC Rcd at 5181-85.

[12] 5 U.S.C. § 603(b)(3).

[13] *Id*. § 601(6)

concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[15]

7. The rules adopted by the *Order* will streamline the local franchising process by adopting rules that provide guidance as to the applicability of prior findings in this proceeding to incumbents and the limitations on the Commission's authority regarding customer service regulations. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of small governmental entities (which, in some cases, may be represented in the local franchising process by not-for-profit enterprises). Therefore, in this SFRFA, we consider the impact of the rules on small governmental entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

8. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.[16] As of 2009, small businesses represented 99.9% of the 27.5 million businesses in the United States, according to the SBA.[17] Additionally, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[18] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[19] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[20] Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.[21] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[22] Thus, we estimate that most governmental jurisdictions are small.

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[14] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

[16] *See* 5 U.S.C. § 601(3)–(6).

[17] *See* SBA, Office of Advocacy, Annual Report of the Office of Economic Research, FY 2011 (December 2011).

[18] 5 U.S.C. § 601(4).

[19] INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

[20] 5 U.S.C. § 601(5).

[21] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

[22] The 2007 U.S Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. If we make the same population assumption about special districts, specifically that they are likely to have a population of 50,000 or less, and also assume that special districts are different from county, municipal, township, and school districts, in 2007 there were 37,381 such special districts. Therefore, there are a total of 89,476 local government organizations. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over

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9. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis…. These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[23] The SBA has developed a small business size standard for this category, which is: all such businesses having $38.5 million or less in annual revenues.[24] Census data for 2007 shows that there were 396 firms that operated for the entire year.[25] Of that number, 349 operated with annual revenues below $25 million, and 47 operated with annual revenues of $25 million or more.[26] Therefore, under this size standard, the majority of such businesses can be considered small.

10. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[27] According to SNL Kagan, there are 1,258 cable operators.[28] Of this total, all but 10 incumbent cable companies are small under this size standard.[29] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[30] Current Commission records show 4,584 cable systems

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50,000. CITY AND TOWNS TOTALS: VINTAGE 2011 – U.S. Census Bureau, *available at* http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Tables 427, 426 (Data cited therein are from 2007).

[23] U.S. Census Bureau, 2012 NAICS Definitions, "515210 Cable and Other Subscription Programming" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[24] 13 C.F.R. § 121.210; NAICS code 515210.

[25] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census;" NAICS code 515210, Table EC0751SSSZ1; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[26] *Id.*

[27] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[28] Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("*15th Annual Competition Report*").

[29] SNL Kagan, U.S. Multichannel Top Cable MSOs, http://www.snl.com/interactivex/TopCableMSOs.aspx (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Competition Report*, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("*CALM Act Report and Order*") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[30] 47 C.F.R. § 76.901(c).

nationwide.[31] Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

11. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[32] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[33] Industry data indicate that, of 1,076994 cable operators nationwide, all but 13 are small under this size standard.[34] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[35] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

12. *Open Video Systems ("OVS")*. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[36] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[37] OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers.[38] The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.[39] Census data for 2007 shows that there were 3,188 firms that operated that year.[40] Of this total, 3,144 firms had fewer than

[31] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

[32] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[33] 47 C.F.R. § 76.901(f); *see* Public Notice*, FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[34] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2007*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2006); Warren Communications News, *Television & Cable Factbook 2007*, "Ownership of Cable Systems in the United States," pages D-1737 to D-1786.

[35] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[36] 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

[37] *See* 47 U.S.C. § 573.

[38] This category of Wired Telecommunications Carriers is defined above. *See also* U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[39] 13 C.F.R. § 121.201; NAICS code 517110.

[40] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

1,000 employees, and 44 had 1,000 or more employees.[41] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[42] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[43] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

13. The rule and guidance adopted in the *Order* imposes no additional reporting or record keeping requirements, and imposes *de minimis* other compliance requirements. Local franchising authorities ("LFAs") will continue to perform their role of reviewing and deciding upon cable franchise applications, as required under the Communications Act. The rules adopted in the *Order* limit the terms that LFAs may impose and negotiate for in those cable franchise agreements. Because the rules limit the terms that an LFA may consider and impose in a franchise agreement, the rules will decrease the procedural burdens faced by LFAs. Therefore, the rules adopted will not require any additional special skills beyond any already needed in the cable franchising context.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternative Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[44]

15. In the *FNPRM*, the Commission sought comment on the extension of its findings in the *First Report and Order* to incumbent cable operators, and to comment on the basis for the Commission's authority to do so.[45] The Commission invited comment on the effect, if any, the findings in the *First Report and Order* had on most favored nation clauses in existing franchises.[46] Additionally, the Commission sought comment on its tentative conclusion that it cannot preempt state or local customer service laws exceeding Commission standards, nor can it prevent LFAs and cable operators from agreeing to more stringent standards.[47] The Commission tentatively concluded that the rules adopted in the *Second Report and Order* likely would have at most a *de minimis* impact on small governmental jurisdictions, and that the interrelated, high-priority federal communications policy goals of enhanced cable competition and accelerated broadband deployment necessitated the extension of its rules to incumbent cable providers.

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[41] *Id*.

[42] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[43] *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[44] 5 U.S.C. § 603(c)(1)-(c)(4).

[45] *First Report and Order*, 22 FCC Rcd at 5164.

[46] *Id*. at 5165.

[47] *Id*. at 5166.

16. We agree with those tentative conclusions, and we believe that the rules adopted in the *Second Report and Order* will not impose a significant impact on any small entity, as the Commission did not disturb many portions of the existing franchise requirements, such as MFN clauses, build-out requirements, time limits for franchise negotiations or customer service laws. Furthermore, the decisions made in the *Second Report and Order* are based on a reading of the statute. Where the Commission did act, it provided regulatory relief to all operators in a non-discriminatory fashion. This action was statutorily necessary, because the language of the statutes at issue does not give the Commission authority to adopt significant alternatives, or to distinguish between incumbent providers and new entrants. As an alternative, we considered refraining from providing guidance on any franchising terms, but we determined, and the petitions for reconsideration and clarification confirm, that guidance was necessary in this instance. We conclude that the guidance we provide in the *Second Report and Order* minimizes any adverse impact on small entities because it clarifies the franchising terms and requirements that local franchising authorities and cable operators negotiate, and should prevent small entities from facing costly litigation over contractual terms regarding in-kind payments, mixed-use networks, and franchise fees.

17. *Report to Congress.* The Commission will send a copy of the *Order*, including this SFRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[48] In addition, the Commission will send a copy of the *Order*, including the SFRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and SFRFA (or summaries thereof) will also be published in the Federal Register.[49]

[48] *See* 5 U.S.C. § 801(a)(1)(A).

[49] *See id*. § 604(b).